IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date: 21st NOVEMBER 1995

CRIMINAL APPEAL NO.821 OF 1987
WITH
CRIMINAL APPEAL NO. 822 OF 1987

AND

CRIMINAL APPEAL NO. 850 OF 1987.

Date of Approval

THE HON'BLE MR. JUSTICE A.N.DIVECHA ,
AND
THE HON'BLE MR. JUSTICE H.R. SHELAT,

1. Whether Reporters of Local Papers may be allowed to see the judgment ?

2. To be referred to the Reporter or not ?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

Mr.H. Chinoy, Advocate for the appellant in Criminal Appeal No. 821 of 1987.

Mr. D.H.Vaghadia, Advocate for the appellant. Criminal Appeal No. 822 of 1987.

Mr.S.R.Divetia, APP for the respondents in all the appeals.

CORAM; A.N.DIVECHA, & H.R.SHELAT,JJ.
DATE; 21ST NOVEMBER, 1995.

COMMON JUDGMENT:- (PER H.R.SHELAT,J.)
1. The appellants after being convicted of the offence under Sec.302 read with Sec.34 of the Indian

Penal Code, in Sessions Case No.118 of 1986 by the then learned Sessions Judge at Mehsana on 2nd September,1987, and sentenced to life imprisonment, have preferred these three separate appeals.

2. In all the three appeals, common questions of law and facts are involved. Hence to avoid duplication of work, hardships to the advocates, undue consumption of time and conflicting judgments, we have preferred to dispose of all the three appeals by this common judgment.

3. In short, it is the case of the prosecution that Baldevbhai was the brother of Pratapji and Babuji, the appellants. Ghanshyam and Baldevbhai had, before one and half months of the incident, gone to leave their preceptor by a jeep. Ghanshyambhai was driving the jeep. On the way back, as alleged, the jeep met with an accident, and Baldevbhai lost his life, while Ghanshyambhai sustained injuries. Pratapji and Babuji were naturally not happy because of loss of their brother- Baldevbhai. They claimed the compensation, and often insisted on the same, but Ghanshyambhai used to delay the matter saying that the papers were being prepared and the compensation would be paid by the Insurance Company or by the Court soon. He would then pay to them. They were also asked to keep patience but by passage of time, Pratap and Babuji were then excited and were burning with anger. Once Pratap, Babuji and Kacharaji, (" the appellants' for the sake of convenience), had gone to Ghanshyambhai for getting compensation, but it was not possible for Ghanshyambhai to pay the amount. At that time, the appellants then turned surly and threatened with life against life. As alleged thereafter they engineered a plan for retaliation out of the ill-will they had bred. On the day of the incident i.e. on 24th April 19865 at 14-30 hrs. Vastaram Gokaldas had been to his field situated in the sim of village Vadu in Kadi Taluka. The appellants who had planned to cause injury and commit murder of Vastaram, went to him and vituperating picked up the quarrel. Pratap who was armed with a knife then gave a knife blow on the abdomen of Vastaram injuring the liver, Babuji who was armed with a spade caused injury with the same near the neck and on the hand. Because of the fatal injuries he sustained, Vastaram fell down. He was struggling for life. Kacharaji while leaving the place gave kick blows to Vastaram. The appellants then left with their weapons they were having, seeing Rambhai Vithalbhai and Kapilaben coming from the opposite side of that field. They were there because as usual they had gone there to graze their cattle and for their cattle a

trough of water (Havada) was also available. Both could witness the incident. Kapilaben immediately went home and informed her father and aunt, narrating how the incident happened and who caused the injuries to the victim. Rambhai Vithalbhai also went to the place of Kapila after tethering his cattle at home and he also informed others about the incident. Then Pujiram and others went to the place of offence. Punjiram, seeing his father in bleeding condition, and on further check up seeing that he was no more, became distraught. Rambhai Vithalbhai then went to the Kadi Police Station and lodged the complaint. The Police Officer investigated into the offence. After the investigation was over, the chargesheet against the appellants came to be filed in the Court of the Judicial Magistrate, (First Class) at Kadi. The learned Magistrate at Kadi, being incompetent to decide the case of murder, committed the case to the Court of Sessions at Mehsana. That case came to be registered as Sessions Case No. 118 of 1986. The then learned Sessions Judge at Mehsana assigned the case to the then learned Additional Sessions Judge at Mehsana for hearing and disposal in accordance with law. The learned Judge below then framed the charge at Ex.3 and took the plea of the appellants. They pleaded not guilty and claimed to be tried. The prosecution then adduced necessary evidence. At the conclusion of the trial, considering rival submissions and the evidence on record, the learned Judge reached the conclusion that the prosecution had successfully brought the guilt home to the appellants, and so he convicted and sentenced as hereinabove stated. It is against this order, the appellants have separately filed these appeals.

4 Mr. Chinoy, the learned advocate representing the appellants, and Mr. D.H.Vaghadiya, the learned advocate representing the appellant, in Criminal Appeal No. 822 of 1987, took us to the entire evidence on record and submitted that there was no justification to convict and sentence the appellants. The learned Judge erroneously appreciated the evidence and reached the conclusions perverse in nature. Mr. Divetia, learned APP, refuted every contention raised.

5. We perused the evidence on record. With meticulous care and finicky details, we examined the evidence of Rambhai Vithalbhai (Ex.11) and Kapilaben (Ex.13) who are alleged to be the eye-witnesses. Their evidence, leaving no room to doubt, inspires confidence. The same being trustworthy cannot be discarded as submitted on behalf of the appellants. Both have stood firm despite grilling cross-examination. Their versions

reflect a veritable picture of the incident. It may be stated that the incident happened during broad daylight. Both were at a visible distance and their vision was not obstructed. They could see without any mistaken impression. Because of the contention we specifically perused the entire evidence and could see that no one deposed so as to feather his own nest, or out of spite or ill-will. With care, we have judged the entire evidence and gave searching scrutiny to ascertain its reliability. We do not find any inherent improbabilities. Both the aforesaid witnesses have narrated on oath how the incident happened, what role the appellants played; how they caused injuries to the deceased after uttering ribaldry. Both have testified in clear terms the case of the prosecution shortly stated herein above. Their evidence positively establishes the guilt of the appellants. Punjaji (Ex.30) has supported the case about the impelling factor viz. the motor accident and the resultant ill-will the appellants had bred. He had also supported the case of the threat of life against life. Within a period of 2 or 2 1/2 months of the threat, the incident happened. The Doctor (Ex.31) who performed the Post Mortem has opined that the injuries caused were sufficient in the ordinary course of nature to cause the death, and the deceased died of the same.

6. Both were knowing the appellants well. It cannot be believed that here is a case of any mistaken identity. The learned Judge has dealt with the point to which we agree. The presence of the eye witnesses is quite natural as they had been there for the purpose of grazing cattle. A torn-piece of the bush-shirt put on by the appellant Pratapji was found from the place of the incident and when he was arrested he had put on the same bush-shirt. The Chemical Analyzer has opined that the said piece was a part of the bush-shirt of the said accused appellant. It is not explained by him how the bush-shirt piece came to be found from the place of the incident. On the basis of such cogent evidence, leaving no scope for innocence of the appellants, we agree with the learned Judge who has, discussing every point of law and fact elaborately assigning valid reasons, reached the conclusion that the charge against the appellant is duly established. We see no reason to upset the judgment and order convicting and sentencing the appellants with which they are charged.

7. Facing with such situation, Mr.Chinoy, the learned advocate representing the appellants, submitted that Sec..302 and also Sec.34 of the Indian Penal Code

would not apply, because there was no prior concert and the evidence in that regard was not available on record; there was no enmity and suddenly the incident happened. It might be the outcome of filthy words uttered followed by sudden fight. At the most, therefore, the case would fall under Sec.304 Part I of the Indian Penal Code. In our view, looking to the evidence on record, Mr. Chinoy has no ground to stand upon.

8. Common intention implies a pre-arranged plan and acting in concert pursuant to the plan. Common intention comes into being prior to the commission of the act in point of time; which has not necessarily to be a long gap. It may develop on the spot and suddenly also. Direct evidence of common intention is a rarity and is mostly based on circumstantial evidence. If the evidence or circumstances on record show that the intention of each of the accused was known to the rest of the accused and all shared the same common intention is constituted. Let us mention about the decision of the Supreme Court in the case of Ramaswami Versus. State of Tamil Nadu AIR 1976 S.C.2027 which lays down that " the essence of Sec.34 is simultaneous consensus of the minds of persons participating in the criminal action to bring such a particular result. Such consensus can be developed at the spot and thereby intended by all of them."

9. In brief, we may say that all acts of killing done

(1) with the intention to kill, or

(2) to inflict bodily injury likely to cause death, or

(3) with knowledge that the death must be the most probable result are prima facie murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder. The difference between culpable homicide and murder is merely a question of different degrees of probability that death would ensure. It is culpable homicide where death must have been known to be a probable result. It is murder where it must have been known to be the most probable result.

10. One has to recollect the evidence of Punjiram (Ex.30), supported by other evidence on record. After the motor accident the appellants were obessed with compensation and that too immediately, were perplexed, on

account of delay, had turned overhasty and impetuous. Often going to Ghanshyambhai, they were demanding compensation but because of certain formalities required to be undergone the payment was delayed. The delay that was being caused induced the appellants to breed ill-will against the deceased too as he was the father of Ghanshyambhai who was driving the ill-fated jeep when it met with the accident. They were by passage of time, losing sense of discretion, and wickedness having projected in their mind, actuating them to plan for the worst; ideated for giving tit for tat. Lastly they went to have the sum of compensation but their acute desire was frustrated. They, it seems, then could not control their chagrin and wrath; and the ill-will they had bred, made them to wreak vengeance. They gave threat of taking an eye for an eye. On the day of the incident, they armed with a knife and a spade went to the field of the deceased, and after ribaldry and being beckoned by one of them, they assaulted the deceased and caused him fatal injuries with the weapons they were having. What can be deduced from such facts on record is that all the three appellants planned to do away with the deceased found to be the hindrance and in furtherance of the plan they went to the field with a knife and a spade; and causing injuries intentionally caused the death of Vastaram Gokaldas. In the alternative it can well be said that all the three knew well the intention of the other one and shared the same by participating and playing the role whatsoever was possible using his own weapon or by fist or kick blows; and thereby shared the same. The appellants therefore, cannot escape Sec. 34 I.P.Code. Likewise they cannot Sec.302 I.P.Code. Because of the ill-will they had bred, the appellants not only went to the field of the deceased with deadly weapons, but attacking with the same also caused fatal injuries giving more than one blow in succession on the vital part of the body as mentioned by Dr. C.S.Parmar in his evidence (Ex.31) and P.M.Note (Ex.32). By such injuries death certainly ensues; and that cannot be beyond contemplation of the appellants. On the basis of such facts it can well be said that the appellants with the intention to kill went to the field of the deceased and inflicted such injuries which were sufficient to cause death. The appellants therefore cannot get out of the clutches of Sec.302 Sec.34 of I.P.Code; and have benefit of Sec.304 Part I or II. The submission about sudden fight and wrong having been done out of provocation cannot find favour, as the above stated facts negative the same. In our view the case on hand is the case of murder and not of culpable homicide not amounting to murder. The conviction and sentence cannot be altered to the offence

u/s. 304 from that of u/s.302 I.P.Code. On no other points submissions were made.

10. In view of the above discussions, the appeals being devoid of merits must fail. In the result, all the three appeals are hereby dismissed and the judgment and order of the lower court convicting and sentencing the appellants passed by the lower court in Sessions Case No. 118 of 1986 are maintained.
